82-1904

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NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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CHERYL SUE WATSON, ET AL.

V.

JOE BARTLETT, ET AL.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Under the applicable rules of Federal Civil Procedure, where a plaintiff does not move for a Directed Verdict or for Judgment N.O.V. at the close of the evidence because, as a practical matter, there is no real possibility that either motion will be granted: Is the scope of Appellate Review necessarily limited to inquiry as to whether there is an absolute absence of any evidence whatsoever supporting the judgment of the District Court, or does the law not require a plaintiff to file a useless motion in order to preserve his right to a full consideration of the merits of his appeal?

LIST OF PARTIES

Plaintiff in this suit is CHERYL SUE WATSON. The defendents in this suit include JOE BARTLETT, JR., Deputy Sheriff of Beauregard Parish, Louisiana, BOLIVAR BISHOP, Sheriff of Beauregard Parish, Louisiana, VANCOUVER PLYWOOD COMPANY, INC., and its employees, ARTHUR M. DOUGHTY, GORDON McKAY and GLENN SALTER, and SOUTHERN RESEARCH COMPANY, as well as defendent insurance companies, TRAVELERS INDEMNITY COMPANY, NORTH RIVER INSURANCE COMPANY, INTERNATIONAL SURPLUS LINES, INC., and MIDLANDS INSURANCE COMPANY.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, CHERYL SUE WATSON, petitions for a Writ of Certiorari to review the Judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered February 22, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, infra. 12-19) was not reported. The District Court did not issue a written opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTORY PROVISIONS INVOLVED

Rule 50 of the Federal Rules of Civil Procedure (28 U.S.C. 50) provides in pertinent part:

"(a) A party who moves for a Directed Verdict at the close of the evidence offered by an opponent may offer evidence in the event that motion is not granted, without having reserved the right so to do and to the extent as if the motion had not been made. A Motion for Directed Verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for Directed Verdicts . . ."

STATEMENT OF THE CASE

This case originated upon the filing of a complaint in the Lake Charles Division of the United States District Court, Western District of Louisiana. Talbot Watson, now deceased, alleged a cause of action arising under 42 U.S.C. 1983 as a result of damages he sustained as a result of his Civil Rights by his former employer, Vancouver Plywood Company, Inc., certain employees of the Vancouver Plywood Company, the Sheriff and Deputy Sheriff of Beauregard Parish and the Southern Research Company who assisted plaintiff's employer in Mr. Watson's arrest, interrogation, subjection to polygraph tests and dismissal. Issue was joined and the suit was subsequently transferred to the Lafayette-Opelousas Division because the Judge who was to have tried the case in the Lake Charles Division recused himself.

On May 12, 1980, Talbot Watson committed suicide. Subsequently, Cheryl Sue Watson was substituted as plaintiff in the above described action. In addition, the original complaint was supplemented and amended to include a cause of action for Talbot Watson's wrongful death on behalf of Cheryl Watson and Jesse Watson, the widow and son, respectively, of Talbot Watson.

Jury trial commenced on March 8, 1982.

On March 19, 1982, the jury returned a verdict showing no liability on the part of any of the named defendents.

Plaintiff's Motion for a New Trial was denied on April 20, 1982, and plaintiff appealed to the United States Court of Appeals for the Fifth Circuit on May 18, 1982.

On February 22, 1983, the Court of Appeals affirmed the District Court's judgment and its denial of Plaintiff's Motion for a New Trial.

The Appellate Court specifically stated that, because plaintiff failed to move for a Directed Verdict or for Judgment N.O.V. at the close of the evidence, the scope of its review of the lower court's judgment and its denial of plaintiff's Motion for New Trial was limited to "an examination 'only for the existence of any evidence'" supporting the jury's verdict. The court further stated that, because of the narrow scope of review it felt it was afforded under Federal Procedure, it could reverse the lower court "only for (the) absence of any evidence" to support the jury's verdict.

REASONS FOR GRANTING THE PETITION

Petitioners submit that in this case the United States Court of Appeals for the Fifth Circuit has decided a very important Federal procedural question not heretofore specifically determined by this Court relating to the standard of appellate review applicable where a plaintiff-appellant proves his case by the great weight of the evidence yet does not move for a Directed Verdict where, given the conflicts in the testimony requiring the jury's determination of questions of credibility, there is absolutely no possibility that such motion will be granted.

(1) THE QUESTION OF FEDERAL PROCEDURE RELATING TO THE APPLICABLE APPELLATE STANDARD OF REVIEW WHERE A PLAINTIFF FAILS TO MAKE THE OBVIOUSLY FUTILE GESTURE OF MOVING FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE HAS NOT HERETOFORE BEEN SPECIFICALLY DETERMINED BY THIS COURT.

The United States Court of Appeals for the Fifth Circuit defines the standard of review it finds to be applicable to its consideration of the merits of plaintiff's appeal from the judgment of the District Court denying plaintiff's claims and from the judgment in the District Court denying plaintiff's Motion for New Trial, where at pages 5 and 6 of its written opinion affirming those decisions, it states:

> "The appellant failed to move for a Directed Verdict or for Judgment N.O.V. She did file a timely Motion for a New Trial, which was denied.
>
> This court has held that when a party fails to move for a Directed Verdict or for Judgment N.O.V. and subsequently appeals on the basis of insufficiency of the evidence, review is limited to "whether there was any evidence to support the jury's verdict, irrespective of its sufficiency or whether plain error was committed, which, if not noticed, would result in a "manifest miscarriage of justice." *Colletti v. Credit Bureau Services, Inc.*, 644 F.2d 1148, 1151 (5th Cir., 1981), quoting *Coughlin v. Capital Cement Company*, 571 F.2d 290, 297 (5th Cir., 1978). As recently stated in *Bunch v. Walter*, 673 F.2d 127, 130 N. 4 (5th Cir., 1982), we are limited to an examination "only for *existence* of *any* evidence." We can reverse only upon a finding of an "absolute absence" of evidence. *Sheeb v. Williams-McWilliams Co.*, 698 F.2d 509, 512 (5th Cir., 1980).
>
> Nor does our review of the lower court's denial of

the appellant's Motion for a New Trial allow us to review the sufficiency of the evidence. We may determine only whether the Court clearly abused it's discretion *Little v. Banker's Life and Casualty Co.*, 426 F.2d 509, 511 (5th Cir., 1970). In making that determination, we again look only to see whether any evidence existed to support the jury's verdict. *Vallot v. Central Gulf Lines, Inc.*, 641 F.2d 347, 349 (5th Cir., 1981).

Extensive expert testimony was presented by the appellees to the jury to substantiate both the circumstances under which the polygraph test was given and the actual administration of the test. While significant testimony was presented by the appellant to dispute the accuracy of the test and the propriety of the administration, we are forced to conclude, under the limited scope of review afforded to us, that certainly *some* evidence was presented which would allow the jury to reach its verdict. It is not appropriate that we evaluate the sufficieny of the evidence or the weight which should have been ascribed to it by the jury. We are only to examine the testimony and evidence presented in order to determine whether there was *any* evidence presented which supports the appellee's case and the jury's finding in appellee's favor. Such evidence is manifested in the record, and we therefore cannot find that no evidence was presented upon which the jury could base its verdict."
(Emphasis supplied by the Court)

It is clear then that it was only because plaintiff's counsel failed to move for a Directed Verdict at the close of the evidence that the Appellate Court considered itself *bound* to deny plaintiff's appeal and affirm the judgment of the lower court. *If there was presented any evidence whatsoever* even tending to support the jury's verdict ("irrespective of its sufficiency", as the Appellate Court put it), and even if this evidence would not normally be sufficient to support the jury's verdict, that portion of

the opinion of the Appellate Court quoted above reveals that the Court considered itself bound to dismiss Mrs. Watson's claims as well as those of her late husband under what it felt to be the applicable standard of review.

Although the Appellate Court seemed to recognize that this extremely limited standard of review rendered practically meaningless the plaintiff's right to appeal the judgments of the lower Court based upon the insufficiency of evidence, and although the Court was certainly aware that under the circumstances there was absolutely no way plaintiff would have been entitled to a directed verdict, still, the Appellate Court apparently felt that this totally meritless and ritualistic motion was somehow required by our law. Plaintiff says that no ratonal procedural rule can require a plaintiff to make such a totally meritless motion under penalty of the loss of important rights. Our law does not require a party to do a useless thing.

The Appellate Court cites no statutory authority for its rule that a plaintiff must, in order to preserve his or her right to a full consideration of the merits of his appeal, file a Motion for a Directed Verdict and for a Judgment N.O.V., when, under the circumstances, both motions would be totally meritless and futile. Further, except for the anomalous reference to F.R.C.P. 50 at p. 297 of the above-cited *Coughlin v. Capitol Cement Company*, decision, neither do the cases cited by the Appellatte Court, in support of its rule disallowing plaintiff a full consideration of the merits of her appeal, make any mention of any statutory basis for this harsh and unfair rule. The Court's reference to F.R.C.P. 50 in the *Coughlin* case is completely unexplained and anomalous since, although F.R.C.P. 50 makes a Motion for Directed Verdict a precondition for a Motion for Judgment N.O.V., it makes absolutely no mention of either motion being a precondition to full appellate review of the sufficiency of the facts supporting either the jury's verdict or the District Court's denial of a Motion for a New Trial based upon insufficiency of evidence.

Neither does the opinion of the Appellate Court even attempt to explain *why* a plaintiff should be denied a full con-

sideration of the merits of his appeal because he fails to make a Motion for a Directed Verdict or a Motion for Judgment N.O.V. when there is absolutely no chance that either motion would be granted. Further, the only purported rationale for the rule contained in any of the opinions cited by the Appellate Court in support of such a rule is that advanced by the Court at page 510 of the above-cited *Little v. Banker's Life and Casualty Co.* decision where the Court stated:

> "The reasons behind the rule are sound. For example, a litigant may not gamble on the jury's verdict and then later question the sufficiency of the evidence on appeal . . . Similarily, the litigant who has not moved for a Directed Verdict in the trial Court must have been of the view that the evidence made in the case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view . . ."

As far as plaintiff is aware, reasons such as those advanced in *Little v. Bankers' Life and Casualty Co.* decision are the sole basis for the rule relied upon by the Appellate Court in denying plaintiff a full Appellate Review. Similar to the assertion that the rule has a statutory basis in F.R.C.P. 50, the argument that the rule has a rational basis in the court's interest in preventing the two evils referred to in the preceding quotation, is totally without merit and cannot bear even the most minimal scrutiny.

The courts justify the arbitrary and unfair rule requiring a plaintiff to move for a Directed Verdict when there is no chance that such motion will be granted with the assertion that to do otherwise would allow the plaintiff to "gamble on the jury's verdict and then later question the sufficiency of the evidence on appeal". To the extent that this rationale makes any sense at all, it is not implicated by the facts of this case for the following reason: It is no longer true that a party waives his right to present evidence (absent an express reservation of that right) when

he moves for a Directed Verdict. Therefore, even assuming (absurdly under the facts of this case) that plaintiff would have had the slightest chance of prevailing on a Motion for Directed Verdict, it is anachronistic to say that there is something hypocritical about "gambling" on the jury's verdict by not filing a Motion for a Directed Verdict. Even assuming plaintiff had something to gain by *not* "gambling" (filing the meritless motion), there is no good reason why he should be penalized for his "gamble" by limiting his right to appellate appeal. Since the effect of failing to succeed on a Motion for Directed Verdict is no longer to be denied the opportunity to present evidence, it is no longer proper to say that a litigant "gambled" anything by making or not making such a motion. Therefore, when he does not make such a motion and subsequently questions the sufficiency of the evidence supporting the verdict against him, he is not (as was the case when the Motion for Directed Verdict and the presentation of evidence were mutually exclusive) attempting to unfairly "renege" after having "gambled" on the jury's verdict.

Similarly, the assertion that a litigant who has not moved for a Directed Verdict in the trial Court "must have been of the view that the evidence made a case for the jury . . . [and] so should not be permitted on appeal to impute error to the trial judge for sharing that view" is patently incorrect. This position is incorrect because it is based on the false assumption that there is no difference between the proof which entitles one to be Directed Verdict and that which entitles one to a New Trial or reversal of the judgment of the trial Court on appeal. Were this not so, Directed Verdicts would be as commonas new trials, and this is not the case. Directed Verdicts should be granted only when there is insufficient evidence to even go to the jury, and this is a far more stringent standard than the "great weight of the evidence" standard applicable in Motions for New Trial. Therefore, while it is correct that a "litigant who has not moved for a Directed Verdict in the trial Court must have been of the view that the evidence made a case for the jury" it is not correct that such a litigant should not be permitted on appeal to impute

error to the trial judge for sharing that view if "that view" (that the evidence made a case for the jury) is the basis for the trial court's denial of Plaintiff's Motion for a New Trial. This so-called rationale for the Appellate Court's harsh rule disallowing plaintiff a full consideration of its appeal implies that if there is sufficient evidence to go to the jury over a Motion for Directed Verdict, then there is necessarily no possible way to grant a new trial in such a case and that plaintiff, by questioning the sufficiency of the evidence after not moving for a Directed Verdict, is somehow seeking to "have his cake and eat it too" or attempting to take an inconsistent position requiring the court to limit his scope of appeal for reasons similar to those lying behind the doctrine of equitable estoppel. This rule would only make sense if the standard for granting a Motion for Directed Verdict were the same as the standard for granting a Motion for New Trial, and this is not the case. ". . . A Motion for Directed Verdict or Judgment N.O.V. raises the legal sufficiency of the evidence, and is to be sharply distinguished from a Motion for New Trial on the grounds that the verdict is against the weight of the evidence. The latter motion is addressed to the sound discretion of the trial Court, which may set aside the verdict as contrary to the preponderance of the evidence, although, a Directed Verdict of Judgment N.O.V. is not justified." 6A *Moore's Federal Practice* 59.08-[5].

Since a judge can err in denying a Motion for a New Trial even though there would have been sufficient evidence to go to the jury and so to deny a Motion for Directed Verdict, it is incorrect to say that a litigant who does not move for a Directed Verdict because he believes there is sufficient evidence to go to the jury, should not be permitted to impute error to the trial judge for sharing that view since the view shared (that there is sufficient evidence to go to the jury) is practically irrelevant in the context of the denial of Plaintiff's Motion for New Trial which Plaintiff assigns as error. Only if the standard for granting a Di ected Verdict were the same as the standard for entering judgment in conformity with the jury's verdict or the standard for granting a new trial based upon the insufficiency

of evidence, would it make any sense to narrow the scope of Appellate Review when plaintiff does not move for a Directed Verdict and thereby deny plaintiff a full consideration of the merits of her appeal.

CONCLUSION

The petition for a Writ of Certiorari should be granted so that Plaintiff's right of appellate review is not preempted by a meaningless procedural technicality.

Respectfully submitted,
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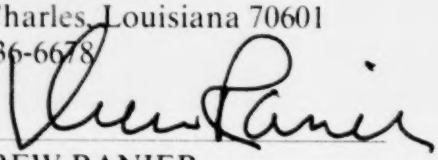
BY: 
DREW RANIER

CERTIFICATE

I certify that a copy of the foregoing Petition for Certiorari to the United States Supreme Court has been served upon JOE BARTLETT, JR., Deputy Sheriff of Beauregard Parish, Louisiana, BOLIVAR BISHOP, Sheriff of Beauregard Parish, Louisiana, NORTH RIVER INSURANCE COMPANY, INTERNATIONAL SURPLUS LINES, INC. by mailing three copies to its counsel of record, David R. Lestage, 205 Second Street, P.O. Box 151, DeRidder, Louisiana 70634, VANCOUVER PLYWOOD COMPANY, INC., and its employees, ARTHUR M. DOUGHTY, GORDON McKAY AND GLENN SALTER and TRAVELERS INDEMNITY COMPANY by mailing three copies to its counsel of record, J.L. Cox., Jr., P.O. Drawer EE, Lake Charles, Louisiana 70601, MIDLANDS INSURANCE COMPANY and SOUTHERN RESEARCH COMPANY by mailing three copies to its counsel of record, Frank M. Walker, Jr., P.O. Drawer 1705, Lake Charles, Louisiana, by United States Mail, postage prepaid and properly addressed.

Lake Charles, Louisiana this 23d day of May, 1983.

DREW RANIER

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-3319
Summary Calendar

CHERYL SUE WATSON, as administratrix of the estate of Talbot E. Watson, individually, and on behalf of the minor, Jesse Lee Watson,

Plaintiff-Appellant,

versus

JOE BARTLETT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

(February 22, 1983)

Before REAVLEY, GARWOOD and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal us from a jury verdict in favor of the defendants. The case was brought under 42 U.S.C. § 1983, alleging violation of Talbot Watson's civil rights by the defendents, Joe Bartlett, Jr., Deputy Sheriff of Beauregard Parish, Louisiana, Vancouver Plywood Company, Inc., and its employees, Arthur M. Doughty, Gordon McKay, and Glenn Salter, and Southern Research Company.

Because we find that there was sufficient evidence to support the jury's findings at trial, and because we find that the district judge did not err in his admission of evidence, we affirm.

I.

Vancouver Plywood Company was engaged in timber and logging operations and in the fabrication of plywood in western Louisiana in the summer and fall of 1978. During this period, Vancouver received reports that one of its contractors, Mr. James Whitaker, was converting timber to his own use rather than delivering it to Vancouver's mills as required by the contract. In investigating the possible conversion, Vancouver hired Southern Research Company, a private firm, to investigate the suspected conversion.

In November 1978, Southern Research enlisted the assistance of the Beauregard Parish Sheriff's Department, and Mr. Whitaker was arrested. He gave oral and written statements to Southern Research indicating that conversion of timber had occurred. Among other information given by Mr. Whitaker was the complicity or knowledge of the conversion by Vancouver employees, including Mr. Talbot Watson, and Watson's supervisor, Rayburn McDaniel.

Vancouver Plywood Company decided that it wanted to administer polygraph tests to Watson and McDaniel and to Brent Wofford, who worked with Watson in McDaniel's department. The tests were administered by Deputy Sheriff Joe Bartlett, who had experience in administering polygraph examinations. Talbot Watson was given the polygraph examination on November 15, 1978, after Deputy Bartlett had obtained his permission to administer the test and had explained the procedures and apparatus to him. Deputy Bartlett told Mr. Watson that he would report the test results to Vancouver.

Bartlett used a polygraph technique known as "relevant-irrelevant" and relied primarily on breathing measurements to determine whether Watson was dissembling. Bartlett's interpretation of the test administered to Watson was that Watson

was not implicated in the conversion of the timber but that Watson was dissembling in some areas regarding his employment. After the test, Deputy Bartlett passed along the test results to Vancouver Plywood Company and indicated the fact that the test was inconclusive concerning the involvement or knowledge by Mr. Watson of the conversion, but that Mr. Watson had been evasive and that Mr. Watson had, in fact, admitted various business irregularities during the examination.

After the test, Watson agreed to go to a local hotel with officials from Vancouver Plywood Company and Southern Research Company to discuss the tests and to discuss Vancouver's concerns. The officials met with Mr. Watson for approximately three hours. The next day, November 16, 1978, Vancouver terminated Watson because of the substantive admissions which he had made to Deputy Bartlett and to the company.

Subsequent to his being fired from Vancouver Plywood Company, Mr. Watson sought employment elsewhere and received two job offers which he rejected. He continued his normal outside activities, including hunting and exercising. He began work on a timber-lumber related venture known as a "scrag" mill.

In July 1979, Watson filed this lawsuit alleging that his civil rights had been violated in that his due process rights, equal protection rights, freedom from illegal search and seizure, rights against self-incrimination and right to counsel had been denied him. He alleged that he had been falsely arrested and imprisoned and that trespass, assault, intentional infliction of emotional distress and defamation of character had been committed against him.

Subsequent to the filing of the lawsuit, Watson committed suicide on May 12, 1980. His wife, Cheryl Watson, in her own and her minor son's account, carried the lawsuit forward, amending the complaint to add a claim for wrongful death, alleging that the appellee's actions caused Watson to commit suicide.

The jury found that Watson's civil rights had not been

violated and that his death was not a result of the termination of employment by Vancouver Plywood Company. The court below entered judgment on the jury's verdict. The appellant filed a timely motion for a new trial which was denied. The appellant filed a timely motion for a new trial which was denied. Mrs. Watson thereafter filed a timely notice of appeal.

II.

There are essentially three issues presented on this appeal:

Whether there was evidence to support the jury's finding that Deputy Bartlett did not violate Talbot Watson's civil rights in the administration of the polygraph exam;

Whether there was evidence to support the jury's determinations that none of the appellees violated Watson's civil rights;

Whether the district judge erred in admitting the petition for divorce filed by Cheryl Watson's attorney on the date of Talbot Watson's suicide?

III.

The appellant argues that the jury's finding that Deputy Bartlett did not violate Watson's civil rights was not supported by the evidence.

The appellant failed to move for a Directed Verdict or for Judgment N.O.V. She did file a timely Motion for New Trial, which was denied.

This court has held that when a party fails to move for a Directed Verdict or for Judgment N.O.V. and subsequently appeals on the basis of insufficiency of the evidence, review is limited to "whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a "manifest miscarriage of justice.'" *Colletti v. Credit Bureau Services, Inc.*, 644 F.2d 1148, 1151 (5th Cir. 1981), *quoting Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 297 (5th Cir. 1978). As recently stated in *Bunch v. Walter*, 673 F.2d 127, 130 n.4 (5th Cir. 1982), we are

limited to an examination "only for *existence* of *any* evidence." We can reverse only upon a finding of an "absolute absence" of evidence. *Scheib v. Williams-McWilliams Co.*, 628 F.2d 509, 512 (5th Cir. 1980).

Nor does our review of the lower court's denial of the appellant's Motion for New Trial allow us to review the sufficiency of the evidence. We may determine only whether the court clearly abused its discretion. *Little v. Bankers Life & Casualty Co.*, 426 F.2d 509, 514 (5th Cir. 1970). In making that determination, we again look only to see whether any evidence existed to support the jury's verdict. *Vallot v. Central Gulf Lines, Inc.*, 641 F.2d 347, 349 (5th Cir. 1981).

Extensive expert testimony was presented by the appellees to the jury to substantiate both the circumstances under which the polygraph test was given and the actual administration of the test. While significant testimony was presented by the appellant to dispute the accuracy of the test and the propriety of its administration, we are forced to conclude, under the limited scope of review afforded to us, that certainly *some* evidence was presented which would allow the jury to reach its verdict. It is not appropriate that we evaluate the sufficiency of the evidence or the weight which should have been ascribed to it by the jury. We are only to examine the testimony and evidence presented which supports the appellees' case and the jury's finding in the appellees' favor. Such evidence is manifest in the record, and we therefore cannot find that no evidence was presented upon which the jury could base its verdict.

This analysis applies as well as to the question of whether the appellees had violated Watson's civil rights by committing the torts of false arrest, intentional infliction of emotional distress, invasion of privacy or slander.

Testimony was presented that Watson consented both to the polygraph test and to the questioning at the local motel. Watson signed a form consenting to the test and admitted upon deposition that his consent was given willingly. Although Talbot Watson denied knowledge of the conversion scheme, he did indicate other irregularities.

In sum, evidence was presented which substantiated the jury's verdict. Watson took the test knowingly and voluntarily. He did not request an attorney. There was no physical restraint nor were there any threats against Mr. Watson. The jury's verdict was supported by evidence.

The remaining issue concerns the admission of the divorce petition which Mrs. Watson had filed on the same day as Mr. Watson committed suicide, May 12, 1980.

Mrs. Watson filed a motion *in limine* to bar admission of the petition. After argument at pretrial conference, the district court judge denied that motion.

Based on FED R. EVID. 403, which allows the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," Mrs. Watson urges that the trial judge abused his discretion in admitting the divorce petition.

Mrs. Watson attempted to prove at trial that Talbot Watson committed suicide because of the events leading up to and including his termination by Vancouver Plywood Company. The appellees, on the other hand, attempted to prove that Talbot Watson committed suicide because of the deteriorating relationship between him and his wife.

We have held that the principal function of Rule 403 is to exclude matter whose relevance is scant or merely cumulative and whose introduction was sought apparently "for the sake of its prejudicial effect." *U.S. v. McRae*, 593 F.2d 700, 707 (5th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 128 (1979). In viewing that relevance, our appellate function is to determine whether the lower court has abused its discretion in admitting or excluding evidence under Rule 403. *Ramos v. Liberty Mut. Ins. Co.*, 615 F.2d 334, 340 (5th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981).

Of course the divorce petition had a significant impact upon the jury. It was intended to have such an impact. It constituted an integral part of the appellees' case to refute the appellant's case. We cannot find that it was unfairly prejudicial or of such inflamatory or outrageous nature as to confuse or mislead the jury. We therefore cannot find that the district court

abused its discretion in admitting the evidence.

For the foregoing reasons, we find that the district court's entry of judgment upon the jury's verdict was proper and therefore affirm the judgment and the denial of the Motion for New Trial.

AFFIRMED